Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

84-711

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EDWARD RONWIN,

Petitioner,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,

Respondent,

SHERMAN D. FOGEL, et al,

Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD RONWIN
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Urbandale, Iowa 50322
(515) 223-8819
Petitioner, pro se

QUESTION PRESENTED FOR REVIEW

Can the United States District Court prohibit the use, by any counsel or party, of non-profane, non-obscene language whether rendered in writing, speech or by symbolic acts because said language charges opposing counsel or parties with deliberate deception, falsehoods, misrepresentations, dishonesties or frauds, or with exhibiting bad faith?

OTHER PARTIES BELOW[1]

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[1] In addition to Sherman D. Fogel, the other parties in interest are: J. Wm. Brammer, Jr.; Denis R. Malm; Hiram A. Cannon; William E. Platt, Jr.; Charles R. Hoover; James Powers; Hon. William A. Holohan; Hon. Frank X. Gordon, Jr.; Hon. Jack D.H. Hays; Hon. James Duke Cameron; Hon. Stanley G. Feldman; The State Bar of Arizona; Educational Testing Service, a New York corporation; and, National Conference of Bar Examiners, a Colorado corporation.

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COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Court of Appeals entered an order on October 23, 1984 denying Petitioner's ("RONWIN") Petition for Writ of Mandamus in Ronwin v. U.S. District Court, CA No. 84-7542 (9 Cir. 1984). The Petition was sparked

by a portion of the District Court's Minute Entry of August 3, 1984 in Ronwin v. Fogel, Civ. 82-896 PHX EHC. Both orders are reproduced in the Appendix.

JURISDICTION

This Petition is filed within 90 days after October 23, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution,

First Amendment:

Congress shall make no law..abridging the freedom of speech...

STATEMENT OF THE CASE

In the District Court, counsel for the Real Parties in Interest have frequently made written statements to said court on behalf of their clients either about RONWIN or about the record which they knew, or should have known, were untrue. RONWIN labelled these statements and acts as either

"deliberate deceptions," "falsehoods," "misrepresentations," "dishonesties," or "frauds." At no time did RONWIN employ profanity or obscenities; and at no time did RONWIN attack the persons of said counsels, verbally or physically.

At a hearing on August 3, 1984, RONWIN complained that the counsel for the NATIONAL CONFERENCE OF BAR EXAMINERS ("NCBE"), a Mr. PHILIP C. THORPE ("THORPE") refused to cooperate on a discovery matter, whereupon the district judge interjected and excused the uncooperative behavior of THORPE on the grounds that RONWIN had accused THORPE (and NCBE) of employing deliberate deception and misrepresentation in NCBE's "Motion To Compel Discovery and for Sanctions." The District Court followed that with a verbal order, later reduced to a Minute Entry, A-2, barring RONWIN from using such words or terms as: "accusation of falsehoods," "deliberate deceptions or similar matters"

on pain of being held for comtempt of court if used. That action was taken despite RONWIN's offer of proof of the truth of RONWIN's allegations which the district judge refused to consider. On August 13, 1984, RONWIN posted a Petition for Writ of Mandamus to the Court of Appeals, 9th Circuit, seeking an Order to void the objectionable portion of said Minute Entry. On October 23, 1984, the Court of Appeals denied said Petition citing Bauman v. United States District Court, 557 F.2d 650 (9 Cir. 1977) without discussion as to why Bauman applied, A-1.

REASONS FOR GRANTING THE WRIT

The United States District Court Is Without Lawful Authority to Prohibit The Use, By Any Counsel Or Party, Of Non-Profane, Non-Obscene Language Whether Rendered In Writing, Speech Or By Symbolic Acts Because Said Language Charges Opposing Counsel Or Parties With Deliberate Deceptions, Falsehoods, Misrepresentations, Dishonesties or Frauds, Or With Exhibiting Bad Faith

The objectionable portion of the District

Court's Minute Entry reads, A-2:

> Further ordered that in any future proceedings, accusations of falsehoods, deliberate deception or similar matters are not to be included in the pleadings or memoranda filed with the Court. Any violation will be punished as a contempt of court.

In fact, at said hearing, the words used by the District judge included the word, "misrepresentation"; and probably included the word, "dishonesty."

That order is an unlawful abrogation of RONWIN's First Amendment rights and an horrendous abuse of the District Court's powers.

As in the Statement of the Case, supra at 3, RONWIN at no time employed any profanity or obscenity; nor did RONWIN caricature nor allude in profane or obscene terms to the persons of opposing counsel or parties. Neither did opposing counsel nor any of their clients ever present an objection. Neither would the District Court consider RONWIN's offers of proof of his allegations.

Even if RONWIN's use of terms like, "falsehoods", "deceptions," "misrepresentations," "dishonesty," and "frauds," were found to be in error, that, too, would not dissipate the guarantees of the First Amendment to RONWIN's remarks; thus, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271, 84 S.Ct. 710, 721, 11 L.Ed.2d 686(1964), reads:

> The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered...
>
> In Cantwell v. Connecticut..[this] Court declared:
>
> > ..the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.'

In the Petition for Writ of Mandamus, RONWIN offered at least five proofs, which

in brief are:

(i) THORPE represented that RONWIN would not divulge information whereas the record section cited by THORPE establishes that RONWIN could not respond because THORPE refused to be specific in his questioning.

Deliberate, out-of-context presentation of material from a record is "misrepresentation" and "deceitful." The District Court refused to consider the proofs offered by RONWIN, but bans the use of perfectly correct English words.

(ii) A second charge by THORPE that RONWIN refused to answer at RONWIN's deposition is refuted by THORPE's own admission in said "Motion to Compel" that RONWIN did answer to the question involved. Thus, the charge of refusal to answer was false! That is an honest and accurate description in perfectly sound English!

(iii) The record reveals that THORPE alleged that RONWIN had "agreed" that certain

physical conditions or biological dysfunctions "affected" every examinee on the Multistate Bar Examination. THORPE used the word, "affect" to mean "affect equally;" whereas, RONWIN used "affect" to mean "affect each examinee differently or not at all." Thus, RONWIN never "agreed" as alleged by THORPE and the record shows that THORPE had reason to know that his allegations were untrue.[2]

---

[2]As an example: RONWIN deposition transcript, which is part of the record in the District Court, reports, p. 166, lines 13-18:

> Q [by THORPE] Now, would you also agree that these defects that we have discussed affect all persons who are taking the [Multistate Bar Examination]?
>
> A [by RONWIN] No, decreased continence doesn't affect every person taking the [Multistate], for God's sakes, that's obvious. Some of these defects do and some don't...

Or, again at p. 168, lines 16-22:

> Q [by THORPE] The atmosphere under which Multistate was given is pressure cooker, that affects all examinees, does it not?
>
> A [by RONWIN] It may affect them differently individually, but it affects then (sic) all in one way or another. Now, it may not affect some to any degree at all that's measurable.

(iv) THORPE characterized RONWIN as attempting to conceal part of RONWIN's medical record; whereas, the record shows that characterization to be utter misrepresentation and deception.

(v) In THORPE's Reply to RONWIN's Response to said Motion to Compel, no attempt was made to refute RONWIN's charges that NCBE, and its agent THORPE, knowingly used falsehoods, deceit and misrepresentations in said Motion to Compel.[2]

There is little other way to call a misrepresentation, or a deceit or a falsehood as anything but a misrepresentation, or a deceit or a falsehood and still be true to the facts; true to the obligation of honest advocacy under the Code of Professional Responsibility and true to the proper use of the English language. In short, a spade must be called a spade. No court has a right to ban a party or his counsel from labelling false, deceitful or misrepresen-

ting what a party (or his counsel) knows or believes to be false, deceitful or misrepresenting on pain of "contempt of court" should the party, or his counsel, state his/their knowledge or belief. But that is what the District Court did in its Minute Entry, and that, as is shown below, is unconstitutional as offensive to the First Amendment, United States Constitution.

In New York Times Co., this Court stated the importance of the First Amendment freedom of free speech in eloquent terms, 376 U.S. at 269, 84 S.Ct. at 720:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The Constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'...'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system'...'[I]t is a prized

American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,'... and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.' N.A.A.C.P. v. Button, 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405. The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'...Mr. Justice Brandies...gave the principle its classic formulation:

> 'Those who won our independence believed * * *that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that

> free speech and assembly should be guaranteed. (emphasis added).

What N.Y. Times Co. holds for political and social discussion must surely hold for "discussion" in court. Indeed, the reference to N.A.A.C.P. v. Button in the quotation above so indicates, and N.Y.Times Co. even more explicitly declares, 376 U.S. at 272, 84 S.Ct. at 722:

> Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision... This is true even though the utterance contains 'half-truths' and 'misinformation'...Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice.... (emphasis supplied).

What N.Y. Times Co. says about judges, surely applies with equal or greater force to opposing counsel, as in this case. Not only are RONWIN's remarks not "half-truths," but the whole truth; and not only are RONWIN's

remarks not "misinformation", but truthful statements, but by no measure can RONWIN's remarks be taken as creating a"clear and present danger of obstruction of justice."

The objectionable portion of the District judge's Minute Entry constitutes an assault on RONWIN's First Amendment rights, which is barred by that Amendment; constitutes a bar to RONWIN's obligation to advocate with honesty and constitutes an abuse of the District judge's judicial power. There is a right to claim that a judge is corrupt, if one so believes, (and it need not be the truth, New York Times Co., supra); and there is surely a right to criticize the advocacy of opposing counsel using such perfectly acceptable English words as, "falsehoods," "deception," "misrepresentation," "dishonesty" and "fraud," or derivatives thereof.

The Court of Appeals denied RONWIN's Petition on the basis of Bauman, supra.

Bauman presents the Ninth Circuit's declaration of the guidelines upon which said Circuit relies in determining whether to grant a Writ of Mandamus, 557 F.2d 654-655. Of the five guidelines, four are fully applicable to this case.

Guideline (1), reads, 557 F.2d at 654: "The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires," citing inter alia, Kerr v. U.S. District Ct., 426 U.S. 394, 403, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976). The order of the District Court interferes with the full advocacy which RONWIN wishes to exercise. It does so in at least two ways: It prevents RONWIN from asserting acts which sum to bad faith, since fraud, deception and misrepresentation are elements of bad faith, Slater v. Motorists Mutual Ins. Co., 174 Ohio St. 148, 187 N. E.2d 45, 48 (1962), and thereby affects (a) rights to attorney's fees aside from statute,

Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240,95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975); and (b) several of the Real Parties in Interest are not official state employees in the judicial area and may not have absolute judicial immunity. They may only have a "qualified judicial immunity." A qualified judicial immunity requires a showing of "good faith," in the Ninth Circuit, Gregory v. Thompson, 500 F.2d 59, 65 (9 Cir. 1974). The opposite of "good faith" is "bad faith," Detenber v. American Universal Ins. Co., 372 F.2d 50, 53 (6 Cir. 1967); State v. Shipman, 202 N.C. 518, 163 S.E. 657, 669 (1932) quoting Black's Law Dictionary, 2d Ed, p. 112. The court's order technically prevents RONWIN from arguing that said Real Parties in Interest have not displayed "good faith" and thereby prevents RONWIN from fair and honest advocacy and from protecting RONWIN's interest in the case by prohibiting RONWIN from de-

claring his view that said parties are not entitled to qualified judicial immunity, unless RONWIN wants to be held in "contempt of court." Correction after appeal will not be possible because a record will be lacking. One must be able to advocate freely before appeal and to make an effective record for any appeal.

Guideline (2) reads, 557 F.2d at 654: "The Petitioner will be damaged or prejudiced in a way not correctable on appeal." What has been said above under Guideline (1) is equally applicable to this Guideline.

Guideline (3) reads, 557 F.2d at 654-655: "The district court's order is clearly erroneous as a matter of law." The onslaught on RONWIN's First Amendment rights is obvious. It represents a gross and unlawful interference with RONWIN's right to call a spade a spade, and with RONWIN's right to advocate freely and competently; and in consonance with the Code of Professional

Responsibility.

Guideline (4), 557 F.2d at 566, is not applicable herein.

Guideline (5) reads, 557 F.2d at 655: "The district court's order raises new and important problems, or issues of law of first impression." RONWIN could find no case on point as respects the facts herein. The closest RONWIN finds is Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed. 2d 284 (1971), where this Court prohibited prosecution for symbolic speech "in the Los Angeles County Courthouse," 403 U.S. at 15-16, 91 S.Ct. at 1783-1784. RONWIN's calling a spade, a spade in non-profane, non-obscene language contains none of the obscenity of Cohen's symbolic speech which met with this Court's approval of Cohen's right to so express himself.

CONCLUSION

The Court of Appeals had every justification for issuing the Writ of Mandamus.

The First Amendment question presented herein is far-reaching for it goes beyond RONWIN's case and affects advocacy throughout our judicial system. The First Amendment must not be trampled by judges, anymore than by any other government servants; especially is that true of government officers who took an oath to uphold the U.S. Constitution. Counsel and pro se parties must be free to advocate as they see fit without fear of imprisonment or fine if they speak the truth as they know or believe it to be in non-profane and non-obscene English.

Wherefore, the Writ sought here, should be granted.

Respectfully submitted

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Petitioner pro se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption)	)	No. 84-7542
	)	DC#CV-82-896 EHC
	)	Arizona
	)	

ORDER

Before: SKOPIL, POOLE and FERGUSON, Circuit Judges

The petition for writ of mandamus is denied. Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977). Petitioner's emergency motion for stay of proceedings in the district court is denied as moot.

(Filed October 23, 1984)

CIVIL MINUTES OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
ARIZONA
PLACE: PHOENIX

Judge: Hon. EARL H. CARROLL
Deputy Clerk: SALLY FEIGHT
Court Reporter: BRIDGET BRITTAN

CIV 82-896 EHC
EDWARD RONWIN v. SHERMAN D. FOGEL, et al

PRELIMINARY PRETRIAL CONFERENCE

APPEARANCES

Edward Ronwin for Plaintiff; Philip Thorpe for National Conference of Bar Examiners and Ruth McGregor for remaining Defendants

MINUTES

Hearing held. ORDER that Plaintiff's Motion for Production of Information is denied. Defendant's Motion to Compel Discovery and for Sanctions is granted in part and denied in part. The Court orders that the requested documents are to be provided within 10 days. The income tax returns shall be provided to defendant and shall be sealed and not disclosed to anyone other than the parties in the litigation.

Further ordered that in any future proceedings, accusations of falsehoods, deliberate deception or similar matters are not to be included in the pleadings or memoranda filed with the Court. Any violation will be punished as a contempt of court.

Further ordered that the Motion for Summary Judgment is set for October 1, 1984 at 11:00 a.m.

DOCKETED BY:
Date: August 3, 1984 Anna M. Baca,
Deputy Clerk